No. 21,212

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHARON L. DE LANGE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

BAREFOOT SANDERS,
Assistant Attorney General,

EDWIN L. MILLER, JR.,
United States Attorney,

MORTON HOLLANDER,
JOHN C. ELDRIDGE,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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JURISDICTIONAL STATEMENT

The appellant instituted this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., for damages for injuries allegedly resulting from a government physician's telling her that she had a certain communicable disease (Tr. I. 2-4). 1/

1/ "Tr. I." references are to Volume I of the Transcript of Record, containing pleadings, motions, the district court's opinion, etc. "Tr. II." references are to Volume II of the Transcript of Record, containing the testimony in the court below.

The district court held that appellant's claim was excepted from the Tort Claims Act by the provision in 28 U.S.C. 2680(h) that t Act shall not apply to "any claim arising out of * * * misrepresentation * * * " (Tr. I. 76-81). Judgment was rendered for the Government on June 14, 1966, and the plaintiff filed her notice appeal on July 11, 1966 (Tr. I. 82). This Court's jurisdiction invoked under 28 U.S.C. 1291.

STATEMENT OF FACTS

The plaintiff-appellant was in July 1964 employed as a waitress at the Chief Petty Officers Open Mess at the United States Naval Training Center, San Diego, California (Tr. I. 3, 76). Sh had been so employed for thirteen months prior to July 1964 (Tr. I. 76). The Navy requires that all of its employees assigned to Naval Training Center Messes be given routine annual physical examinations after their employment commences in order to qualify for continued employment (Tr. I. 67-69, 72). The purpose of the examinations is to protect people served at such messes (Tr. I. 72). On July 8, 1964, appellant reported to the dispensary at the Naval Training Center for her annual physical examination, as part of that examination she was given a VDRL test (Veneral Disease Research Laboratory test) (Tr. I. 64, 73). The results of the VDRL test on that date were "doubtful positive, weakly r active," and appellant was told to return about a week later fo another blood test (Tr. I. 73, 76). The results of the second

VDRL test done on July 15, 1964, were again "doubtful positive, weakly reactive" (Tr. I. 73, 76).

Appellant testified that on July 20, 1964, she received a call from a Chief at the dispensary who told her not to report to work because she had syphilis (Tr. I. 76). She further testified that she requested to speak with the doctor in charge, and that she then talked to a Dr. Emanuel who told her that she had syphilis and advised her to go to a private physician (Tr. I. 77).

As the district court found, upon being told that she had syphilis, the appellant became upset and hysterical (Tr. I. 77). She then took three separate blood tests, one at the Public Health Center, another at the United States Naval Hospital, and another from a private physician, and the results of these tests were negative (Tr. I. 77). These latter three tests, plus a subsequent test, established that the appellant did not have syphilis and that the representation by Dr. Emanuel was erroneous (Tr. I. 77). As revealed by the testimony and the district court's findings, the blood test which was given at the dispensary on July 8, 1964, and repeated on July 15, 1964, is a broad spectrum test, and a positive reaction does not rule out other diseases besides syphilis, such as malaria, measles and mononucleosis (Tr. I. 77). When the VDRL test indicates a positive reaction, more refined tests must be given to determine the exact cause of the reaction (Tr. I. 77).

As a result of being told that she had syphilis, the appellant allegedly has suffered permanent injury to her personality and character, great mental pain, suffering and anguish, embarrassment and loss of earnings" (Tr. I. 3). It was alleged that

she has incurred medical expenses and will continue to incur ther (Tr. I. 3). The appellant's physician testified that being told that she had syphilis aggravated a pre-existing mental condition (Tr. II. 120), which has resulted in appellant being disabled fr returning to work (Tr. II. 112).

After the trial, the district court rendered an opinion con taining findings of fact and conclusions (Tr. I. 76-81). Speci- fically, the court found that the appellant's damage flowed from the original communication to her on July 20th that she had syph and that a claim arising out of such a communication is excepted from the Tort Claims Act's coverage, in light of 28 U.S.C. 2680(as construed by this Court in Hungerford v. United States, 307 F. 2d 99, 102-103 (C.A. 9).

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., provides in pertinent part:

§ 2680. Exceptions.

> The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The Federal Employees' Compensation Act, 5 U.S.C. (September 1966 revision) 8116(c) provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 U.S.C. (September 1966 revision) 8171-8173 provides in pertinent part:

§ 8171. Compensation for work injuries; generally.

(a) Chapter 18 of title 33 applies with respect to disability or death resulting from injury, as defined by section 902(2) of title 33, occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is —

> (1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or
>
> (2) employed inside the continental United States.

However, that part of section 903(a) of title 33 which follows the first comma does not apply to such an employee.

* * *

§ 8173. Liability under this subchapter exclusive.

The liability of the United States or of a nonappropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by sections 8171 and 8172 of this title, shall be determined as provided by this subchapter. This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

ARGUMENT

The waiver of sovereign immunity for tort claims in the Fed eral Tort Claims Act does not extend to appellant's action upon two separate grounds. First, as shown in Point I below, the dis trict court correctly held that appellant's claim was barred by the statutory exclusion for claims arising out of misrepresentat This holding was compelled by this Court's opinion in Hungerford United States, 307 F. 2d 99, 102-103 (C.A. 9). Second, as we on to demonstrate under Point II, appellant's injury arose out and in the course of her employment as a governmental employee, and, consequently, her exclusive remedy against the Government to file a claim for workmen's compensation benefits. United St v. Forfari, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S.

I. APPELLANT'S CLAIM IS BARRED BY THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT.

In her brief, the appellant frankly acknowledges that "In the case at bar it is absolutely clear under the decision and findings of the trial court that appellant's damages occur as a direct result of the misrepresentation of an agent of the United States * * * (Appellant's brief, p. 10). However, the Federal Tort Claims Act in 28 U.S.C. 2680(h) excludes from its coverage "any claim arising out of * * * misrepresentation * * * ." This exception "comprehends claims arising out of negligent, as well as willful misrepresentation." United States v. Neustadt, 366 U.S. 696, 702. As appellant's claim admittedly arises out of an alleged negligent "misrepresentation" by a government employee, the misrepresentation exception to the Tort Claims Act furnishes a dispositive ground requiring affirmance of the district court's decision.

Directly in point is this Court's decision in Hungerford v. United States, 307 F. 2d 99, 102 (C.A. 9), where the Court stated:

> A communicated diagnosis as to physical condition is a representation. See Hall v. United States, 10 Cir., 274 F. 2d 69. An incorrect representation is a "misrepresentation" within the meaning of the statute, whether wilful or based upon negligence is ascertaining the facts represented. United States v. Neustadt, 366 U.S. 696, 702, 81 S.Ct. 1294, 6 L. Ed. 2d 614.

In Hungerford, also a medical malpractice case, this Court went on to draw a distinction between the type of medical malpractice covered by the misrepresentation exception and the type falling

outside of the exception. Thus, where the alleged negligence of the government physician causing the plaintiff's injury is in the diagnosis of the plaintiff's condition and the communication to the plaintiff, unaccompanied by a negligent failure to render tre ment, the misrepresentation exception is applicable. On the othe hand, as the Court further held in Hungerford, where the governme physician also has a duty to render treatment for the plaintiff's condition, the breach of this additional duty is not excepted fr the Tort Claims Act, despite the fact that a negligent diagnosis communicated to the plaintiff may have been an element in the fa ure to render proper treatment.

In light of the distinction drawn in Hungerford, it is clea that the instant case is excepted from the coverage of the Tort Claims Act. The appellant reported to the dispensary at the Nav Training Center merely for a routine annual physical examination required by her employment, not for any treatment (Tr. I. 2-3, 6 69, 72; Tr. II. 8, 51, 54, 56). The sole purpose of the examina tion was to determine whether the appellant had any communicable disease which would bar her employment at the mess, in order to protect the people served at the mess (Tr. I. 64, 67-69, 72; Tr. II. 56, 71-72). [2/] Appellant would not have been able to obtai treatment at the dispensary, but would have had to obtain

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2/ Thus, the appellant stipulated in the district court that "All persons employed in handling food at the Naval Training Cer ter Messes are given yearly routine physicals for the purpose of protecting people served at such Messes" (Tr. I. 72).

treatment at the United States Naval Hospital, San Diego, California (Tr. I. 66; Tr. II. 71). Furthermore, as the appellant stated in the court below and as the court found, she was not injured by lack of treatment but her injury flowed from the communication to her (Tr. I. 41, 81). Consequently, appellant's claim does not arise out of a negligent failure to render treatment, which might be actionable. Instead, her claim arises solely out of an incorrect communicated diagnosis as to her physical condition, which, as held by this Court in Hungerford, is a misrepresentation within the meaning of the Tort Claims Act's exception.

The appellant, acknowledging that the district court's decision was compelled by Hungerford v. United States, asks this Court to overrule the position taken in Hungerford (Appellant's brief, pp. 10-12). However, as this Court has stated,"This Court should respect and follow our previous opinions. The trial courts are entitled to rely upon such earlier pronouncements." California State Board of Equalization v. Goggin, 245 F. 2d 44, 45 (C.A. 9) certiorari denied, 353 U.S. 961. See also, Etcheverry v. United States, 320 F. 2d 873, 874 (C.A. 9), certiorari denied, 375 U.S. 930. The weight that should be accorded prior decisions is illustrated by this Court's rule that "a decision of this Court can be overruled only in en banc proceedings," Ellis v. Carter, 291 F. 2d 270, 273, fn. 3 (C.A. 9). In addition, on questions of statutory construction, a court is even more reluctant than usual to reconsider its prior interpretation of a statute, as "'Congress can rectify our mistake, if such it was, or change its policy at any

time, and in these circumstances reversal is not readily to be made.'" Patterson v. United States, 359 U.S. 495, 496.

Furthermore, appellant has failed to demonstrate that the distinction drawn in Hungerford v. United States is erroneous. Appellant's principal reliance for her position that the Tort Claims Act's misrepresentation exception is not applicalbe to me cal malpractice cases, is a footnote in United States v. Neustad supra, 366 U.S. at 711, fn. 26, where the Court quoted Dean Pros ser's statement that the separate tort of negligent misrepresent tion has been confined "very largely to the invasion of interest of a financial or commercial character, in the course of busines dealings." However, the Supreme Court did not hold that the mis representation exception to the Tort Claims Act was exclusively fined to such situations. On the contrary, the Court's use of t word "largely", and its citation with approval of cases applying the exception to other situations than an invasion of financial or commercial interests in the course of business dealings (366 U.S. at 702-703), demonstrates that the Supreme Court was not ho ing that the exception applies exclusively to this category of cases. Thus, the Supreme Court cited with approval this Court's decision in Clark v. United States, 218 F. 2d 446, 452 (C.A. 9) and the Eighth Circuit's decision in National Mfg. Co. v. Unite States, 210 F. 2d 263, 275-276 (C.A. 8), which did not involve invasion of commercial or financial interests but involved dire physical injury to persons and property as a result of weather ditions inadequately reported, and in which both courts held th

the Tort Claims Act's misrepresentation exception was a bar to recovery. In addition, the Court in United States v. Neustadt, supra, 366 U.S. at 703-704, cited with approval and quoted from the Tenth Circuit's decision in Hall v. United States, 274 F. 2d 69 (C.A. 10), which, although involving an invasion of the plaintiff's financial interests, did not involve a "course of business dealings" between the plaintiff and the Government. 3/

Furthermore, the consistent holdings of the federal courts disclose beyond any doubt that the misrepresentation exception to the Tort Claims Act embraces other situations than an invasion of financial or commercial interests in the course of business dealings. In addition to Hungerford v. United States, supra; Clark v. United States, supra; National Mfg. Co. v. United States, supra; and Hall v. United States, supra; which we have discussed above, see also, Beech v. United States, 345 F. 2d 872, 874 (C.A. 5) (agreeing with the distinction drawn in Hungerford); Tapia v. United States, 338 F. 2d 416 (C.A. 2) (holding that the Government's obtaining of a criminal conviction by means, inter alia, of "false representations, is not actionable because of 28 U.S.C. 2680(h)); Steinmasel v. United States, 202 F. Supp. 335, 338 (D. S.D.) (holding that misrepresentations causing the plaintiff to lose veteran's benefits are covered

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3/ It is also significant that the Neustadt opinion was rendered prior to this Court's decision in Hungerford and was cited in Hungerford. Consequently, this Court apparently did not view the Supreme Court's opinion as holding that 28 U.S.C. 2680(h) was limited to situations involving an invasion of financial or commercial interests in the course of business dealings.

by the misrepresentation exception); Bartie v. United States, 21 F. Supp. 10, 20-21 (W.D. La.), affirmed, 326 F. 2d 754 (C.A. 5), certiorari denied, 379 U.S. 852 (involving misrepresentations concerning weather conditions). 4/

It is probably true, as the Supreme Court's opinion in United States v. Neustadt indicates, that the misrepresentation exception to the Tort Claims Act will most often be applicable in cases involving an invasion of financial or commercial interests in the course of business dealings. 5/ However, as we have shown, the

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4/ In her effort to show that the statutory exclusion for claims arising out of misrepresentation is confined to conduct "involving business transactions," appellant attempts to distinguish the weather report cases on the ground that, in such situations, no duty is owed by the Government to the plaintiffs (Appellant's brief, pp. 8-9). Of course, if the courts in those cases had held that no duty was owed, there would have been no causes of action as a matter of tort law, and the question of the misrepresentation exception would not have been reached.

Actually, in all three weather report cases previously referred to (Clark v. United States; National Mfg. Co. v. United States; and Bartie v. United States), the Government had argued as an alternate ground that no duty was owed to plaintiffs. Except for the concurring opinion in National Mfg. Co., the courts did not reach this question, but based their decisions on the Tort Claims Act's misrepresentation exception, as well as other exclusions to the Act. For example, in Clark, this Court "assumed" arguendo that "the United States owed a duty to appellants" (218 F. 2d at 451) and flatly held that the misrepresentation exception barred the claim (268 F. 2d at 452).

Consequently, there is no merit to appellant's attempted distinction of the weather report cases. Appellant has not even attempted to distinguish the other cases cited above applying the misrepresentation exception to situations not involving business transactions.

5/ E.g., United States v. Neustadt, supra; Jones v. United States, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; Miller Harness Co. v. United States, 241 F. 2d 781, 783 (C.A. 2); Anglo-American & Overseas Corp. v. United States, 242 F. 2d 236 (C.A. 2

exception has not been exclusively limited to such situations. An examination of the cases reveals that where the specific activity of the government being complained of primarily involves the making of verbal or written statements, along with the preliminary steps necessary thereto, and where the plaintiff's injury is directly caused by erroneous oral or written communications or the failure to so communicate, the misrepresentation exception in 28 U.S.C. 2680(h) prohibits the imposition of liability upon the Government. As the Court of Appeals stated in National Mfg. Co. v. United States supra, 210 F. 2d at 276: "The intent of the section is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States." On the other hand, where the making of a representation is merely an incidental element in the particular activity being complained of and which causes the injury, the courts have held that the exception is not applicable.[6/] Furthermore, where the "misrepresentation" does not consist of oral or written statements, but consists of conduct not normally thought of as a communication, the exception

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6/ See, Hungerford v. United States, supra; and Beech v. United States, supra. See also, United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 398 (C.A. 9), certiorari dismissed, 379 U.S. 951.

has not been applied. 7/

This Court's decision in Hungerford v. United States, supra is entirely consistent with the course of decisions dealing with the Tort Claims Act's misrepresentation exception. Furthermore, as previously pointed out, the distinction drawn in Hungerford h been followed by the Fifth Circuit in Beech v. United States, su 345 F. 2d at 874. Appellant has completely failed to demonstrat that the Hungerford decision should be overruled. And, as appel lant admits, if the position taken by the Court in Hungerford is

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7/ For example, where there has been a failure by the Government to properly warn of impending danger under circumstances where the warning would be expected to take the form of oral or written statements being disseminated, as in the weather report cases, the misrepresentation exception has been applied. However, where the failure to properly warn involves other form of conduct, such as permitting a beacon lamp in a lighthouse to go out, the exception has not been applied. Compare Clark v. United States, supra; and National Mfg. Co. v. United States, supra; with Indian Towing Co. v. United States, 350 U.S. 61.

not reversed, the instant claim is precluded by 28 U.S.C. 2680(h). 8/

8/ Finally, even if appellant were correct in her contention that Hungerford should be overruled, and that the Tort Claims Act's exclusion for claims arising out of misrepresentation is limited to situations involving an invasion of financial or commercial interests, in the course of business dealings, it is by no means clear that appellant's claim would still not be barred by the misrepresentation exception. The appellant was rendering a service to the Government for a salary; the Government's examination of the appellant was to determine whether appellant would be permitted to continue rendering that service; the representation concerning appellant's condition was entirely in connection with this employer-employee relationship; the immediate consequence of the representation was that appellant would no longer be allowed to continue as a governmental employee; and one of the items of damage flowing from the misrepresentation is that appellant is disabled from working for anyone (Tr. I. 48). Such a claim might very well be viewed as involving an invasion of interests of a financial or commercial character, in the course of business dealings.

If, instead of rendering a service, appellant was selling a product to the Government, if the Government had examined that product to determine whether it would continue buying it, if the Government had incorrectly represented the nature of the product so that appellant could no longer continue selling it to the Government, and if the incorrect representation injured appellant with respect to selling the product to others, appellant's claim would clearly be viewed as involving an invasion of financial or commercial interests in the course of business dealings, and barred by 28 U.S.C. 2680(h). The only difference between the present case and the hypothetical, is that the business dealings and representations involve services rendered by an individual instead of a product.

II. AS APPELLANT'S INJURY AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT AS A GOVERNMENT EMPLOYEE, THERE IS NO JURISDICTION UNDER THE FEDERAL TORT CLAIMS ACT TO ENTERTAIN HER SUIT, BUT HER EXCLUSIVE REMEDY AGAINST THE GOVERNMENT IS A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS.

As we have demonstrated, appellant's claim is excepted fro the coverage of the Federal Tort Claims Act by the exclusion in 28 U.S.C. 2680(h) for claims arising out of misrepresentation. However, there is another equally dispositive ground requiring affirmance of the district court's decision in this case. Sinc appellant's injury arose out of and in the course of her employ ment as a governmental employee, her exclusive remedy against the Government is to file an administrative claim for workmen's compensation benefits. As Congress has expressly provided, 5 U.S.C. (September 1966 revision) 8116(c), 8173, the United Stat may not be held liable under the Federal Tort Claims Act for such a work-related injury to a governmental employee.[9/]

9/ This particular ground for dismissal of the appellant's action was not raised by the Government in the district court. However, "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." Jaffke v. Dunham, 352 U.S. 280, 281. See also, Helvering v. Gowran, 302 U.S. 238, 245.

Furthermore, a statutory limitation upon suits against th United States raises a jurisdictional question which may not b waived. See, e.g., Finn v. United States, 123 U.S. 227, 233; United States v. Michel, 282 U.S. 656; Munro v. United States, 303 U.S. 36, 41; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506; Rodinciuc v. United States, 175 F. 2d 479, 481 (C.A. 3), certiorari denied, 338 U.S. 895; Albe v. Brownell, 219 F. 2d 602, 604-605 (C.A. 9); United States v. Finn, 239 F. 2d 679, 683 (C.A. 9). "Not even a U.S. District Attorney may waive conditions or limitations imposed by statut in respect of suits against the United States." Anderegg v. United States, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967.

Congress has provided two comprehensive compensation schemes for federal government employees who sustain personal injuries related to their government employment. The Federal Employees' Compensation Act, 5 U.S.C. (1966 revision) 8101-8150, provides compensation for regular government employees and certain others rendering services to the United States (§ 8101) who sustain injuries "while in the performance of [their] dut[ies] * * * " (§ 8102).[10/] With respect to employees of so-called "Nonappropriated Fund Instrumentalities," Congress has in 5 U.S.C. (1966 revision) 8171-8173 provided that they should receive compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, for injuries "arising out of and in the course of employment" (33 U.S.C. 902(2)).[11/]

10/ The Employees Compensation Appeals Board of the Department of Labor, the agency which renders final decisions under the Federal Employees' Compensation Act, has held that the phrase "while in the performance of his duty" contained in the Federal Employees' Compensation Act is synonymous with the phrase "arising out of and in the course of employment" contained in most other workmen's compensation laws. See, e.g., In the Matter of Harold Vandiver, 4 E.C.A.B. 195, 196 (1951); In the Matter of Lillie J. Wiley, 6 E.C.A.B. 500, 502 (1954); In the Matter of Robert A. Hoban, 6 E.C.A.B. 773 (1954).

11/ Prior to 1952, employees of nonappropriated fund instrumentalities were covered by the Federal Employees' Compensation Act. In that year, Congress exempted such employees from the provisions of the Federal Employees' Compensation Act, and provided that the nonappropriated fund instrumentalities should procure workmen's compensation insurance in accordance with state law (66 Stat. 138). In 1958, Congress enacted the present provisions, making the Longshoremen's and Harbor Workers' Compensation Act applicable to such employees (72 Stat. 397). This Court's opinion in United States v. Forfari, 268 F. 2d 29, 32-33, certiorari denied, 361 U.S. 902, discusses this history and the various statutory changes.

It is well-established that where an injury to a federal employee is embraced by either Compensation Act, no action base upon that injury may be maintained under the Federal Tort Claim Act or under any other federal tort liability statute. The Compensation Act remedy is exclusive. See, e.g., Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S. 495; United States v. Firth, 207 F. 2d 665 (C.A. 9); Underwood v. United States, 207 F. 2d 862 (C.A. 10); Balancio v. United States, 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; Somma v. United States, 283 F. 2d 149 (C.A. 3); all involving injuries encompassed by the Federal Employees' Compensation Act. See also, United States v. Forfari, 268 F. 2 29 (C.A. 9), certiorari denied, 361 U.S. 902; Lowe v. United States, 292 F. 2d 501 (C.A. 5), affirming 185 F. Supp. 189 (N.D. Miss.); Rizzuto v. United States, 298 F. 2d 748 (C.A. 10) all involving employees of nonappropriated fund instrumentalit

Indeed, this exclusivity has been codified by Congress wi respect to both compensation schemes. Thus, 5 U.S.C. (1966 revision) 8116(c), supra, p. 5 , provides that the liability of the United States or an instrumentality thereof under the Federal Employees' Compensation Act "is exclusive and instead of all other liability of the United States * * * because of the injury * * * in a direct judicial proceeding, in a civil action, * * * or under a Federal tort liability statute." Similarly, 5 U.S.C. (1966 revision) 8173, supra, p. 6 , provides that the liability of the United States or of a nonappro priated fund instrumentality to pay compensation under the

Longshoremen's and Harbor Workers' Act shall be "exclusive and instead of all other liability of the United States or the instrumentality to the employee * * * under a Federal Tort liability statute." Therefore, Congress has specifically exempted from the coverage of the Tort Claims Act a claim based upon a work-related injury to a regular governmental employee or an employee of a nonappropriated fund instrumentality.[12/]

The appellant's injury is clearly covered by one or the other of the federal employees' workmen's compensation systems. As previously pointed out, the examination and diagnosis of appellant was solely for employment purposes (Tr. I. 72; Tr. II. 8, 32-33, 38, 51, 56, 72-73). It was for the benefit of the Government and the persons being served by the Government at the mess, not for appellant's benefit (Tr. I. 72). The examination and diagnosis was required by the regulations of appellant's employer, the Navy (Tr. I. 64-65, 67-69). It is well-settled that an injury resulting from a medical examination under such circumstances is compensable as a matter of workmen's compensation law. Cf., Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438; Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421,

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12/ The record in this case does not disclose whether or not the Chief Petty Officers' Mess where appellant was employed was a nonappropriated fund instrumentality, although we believe that it was. See, United States v. Forfari, supra, 268 F. 2d at 30-31; Lowe v. United States, supra, 185 F. Supp. at 190. However, for purposes of this case, it makes no difference whether the appellant's remedy is under the Federal Employees' Compensation Act or the Longshoremen's and Harbor Workers' Compensation Act. As we have shown, whichever Compensation Act provides the remedy, that remedy is exclusive and appellant's claim is not cognizable under the Tort Claims Act.

188 N.E. 870; Saintsing v. Steinbach Company, 1 N.J. Super. 259 64 A. 2d 99; Texas Employers' Ins. Ass'n. v. Mitchell, 27 S.W. 600 (Tex. Civil Appeals).[13/]

There can be no doubt in this case that the medical examin tion and communicated diagnosis which injured appellant arose out of and in the course of her employement as a government em- ployee. Consequently, her exclusive remedy is to file a claim for compensation, and no liability for the injury may be assess against the Government "under a Federal tort liability statute,

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13/ Some courts have drawn a distinction between a medical examination or procedure required by the state and one required by the employer, holding that the former is not in the course of employment while the latter is, although the distinction has been criticized. See, 1 Larson's Workmen's Compensation Law (1965 ed.), § 27.32. However, in the present case, the medical examination was required by the employer (Tr. I. 67-69

5 U.S.C. (1966 revision) 8119(c), 8173.[14/]

14/ If this Court agrees with both our argument that the Tort Claims Act's misrepresentation exception is applicable and our argument that appellant's exclusive remedy is under one of the workmen's compensation schemes for federal employees, it might be beneficial to appellant if this Court's decision is placed upon both grounds instead of just the misrepresentation exception. This might make a difference with respect to whether or not appellant can now file a claim for compensation.

Although the time for filing a claim for disability under the Federal Employees' Compensation Act is 60 days from the time of injury, the Secretary of Labor has the discretion to waive this requirement provided that the claim is filed within five years and the claimant has a sufficient reason explaining the failure to file within 60 days, 5 U.S.C. 8122(c). Thus, if appellant's remedy is under this statute, a claim filed now would probably be considered timely.

However, if appellant's remedy is under the Longshoremen's and Harbor Workers' Compensation Act, and we believe that it is, the basic time limit for filing claims is one year after the injury, 33 U.S.C. 913(a). However, that statute goes on to provide (33 U.S.C. 913(d)):

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect to injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

If this Court rests its decision on the ground, inter alia, that appellant's remedy is under one or the other Compensation Act, the requirements of 33 U.S.C. 913(d) would be satisfied, and appellant would have one year from this Court's decision to file a claim.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

BAREFOOT SANDERS,
Assistant Attorney General,

EDWIN L. MILLER, JR.,
United States Attorney,

MORTON HOLLANDER,
JOHN C. ELDRIDGE,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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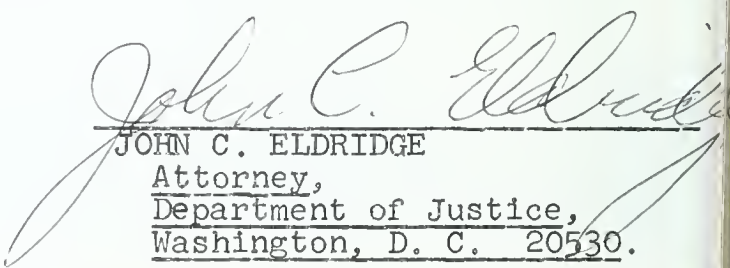
CERTIFICATE OF COMPLIANCE WITH RULES 18 AND 19 OF THIS COURT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN C. ELDRIDGE
Attorney,
Department of Justice,
Washington, D. C. 20530.